Supreme Court, U.S.
FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1778

In the Supreme Court of the United States

October Term, 1985

UNITED FOOD & COMMERCIAL WORKERS,
LOCAL 626,
Petitioner,

vs.

THE KROGER COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

TED IORIO, *Counsel of Record*
GALLON, KALNIZ & IORIO CO., LPA
3161 N. Republic Blvd.
Toledo, Ohio 43615
(419) 535-1976
Counsel for Petitioner Local 626

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

12 pp

TABLE OF CONTENTS

TABLE OF CONTENTS I
TABLE OF AUTHORITIES I
REPLY BRIEF 1
I. INTRODUCTION 1
II. ARGUMENT 2
CONCLUSION 9

TABLE OF AUTHORITIES

Cases

IAM Lodge No. 1266 v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981) 3, 4, 5
Johanson v. San Diego District Council of Carpenters, 745 F.2d 1289 (9th Cir. 1984) 7
Lever Bros. Co. v. International Chemical Workers Union, Local 217, 554 F.2d 115 (4th Cir. 1976) 5
Local 1115, Joint Board Nursing Home & Hospital Employees v. B & K Investments, Inc., 436 F. Supp. 1203 (S.D. Fla. 1977) 4
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 6
National Labor Relations Board v. Express Publishing Co., 312 U.S. 426 (1941) 6
National Labor Relations Board v. International Van Lines, 409 U.S. 48 (1972) 6
Nursing Home & Hospital Union No. 434 v. Skyview Terrace, Inc., 759 F.2d 1094 (3rd Cir. 1985) 5
Smegal v. Gateway Foods, 763 F.2d 354 (8th Cir. 1985) 5
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) 7
Weinstein v. Bradford, 423 U.S. 147 (1975) 6, 7

No. 85-1778

In the Supreme Court of the United States

October Term, 1985

UNITED FOOD & COMMERCIAL WORKERS,
LOCAL 626,
Petitioner,

vs.

THE KROGER COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. INTRODUCTION

The following brief discussion is in response to the new arguments raised in Respondent Kroger Company's (hereinafter referred to as the "Company") Brief in Opposition to the Petition for a Writ of Certiorari filed in this Court by Petitioner United Food & Commercial Workers Local No. 626 (hereinafter referred to as the "Union"). To briefly summarize the relevant facts as set forth in the Petition, in 1984 the Kroger Company sought contract concessions from the Union, threatening to close the Company's three (3) Lima, Ohio stores if the concessions were not met. The Company rejected

the Union's counterproposals and closed the three (3) Lima, Ohio stores in late 1984.

The Union filed a grievance pursuant to the successors and assigns clause of the contract between the parties.[1] When the Company refused to arbitrate the grievance, the Union filed suit in the United States District Court for the Northern District of Ohio, Western Division, to enjoin the sale or other transfer of the Lima, Ohio stores pending resolution of the Union's grievance by an arbitrator. The District Court refused to enjoin and the Company sold the stores. The United States Court of Appeals for the Sixth Circuit affirmed the District Court's denial of injunctive relief, but determined that the Company's sale of the stores did not render the controversy moot. The Union filed a Petition for Rehearing with Suggestion for Rehearing En Banc in the Sixth Circuit. The Sixth Circuit denied the Petition for Rehearing, whereupon the instant Petition for a Writ of Certiorari was filed.

II. ARGUMENT

A. RESPONDENT HAS FAILED TO REFUTE THAT A CONFLICT AMONG THE CIRCUITS EXISTS.

The Company's Brief in Opposition unsuccessfully attempts to refute the conflict among the Circuits that is perpetuated by the opinion below. The Company attempts to distinguish the Seventh Circuit's decision in

---

1. The successors clause is found in the Preamble of the contract between the parties, and provides that the agreement is between the Company, "its successors and assigns", and the Union. *See* App. pp. A19 and A36.

IAM Lodge No. 1266 v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981), by the same invalid argument that it has advanced throughout this litigation. The Company claims that the *Panoramic Corp.* decision is distinguishable in that the balancing of the hardships in *Panoramic* did not involve a sale motivated "by any financial imperative" on the part of the employer. Respondent urges that the sale of the three (3) Lima, Ohio Kroger stores was based upon such a financial imperative. The dollar losses claimed by the Company at the District Court hearing were largely projections and failed to consider such significant matters as tax consequences favorable to the Company and the transferability of a large portion of the Lima stores' inventory and equipment to other nearby Company stores.[2] More importantly, the Company's assertion of financial imperative ignores a basic prerequisite to injunctive relief—namely, the Petitioner's obligation to obtain a bond as security for the payment of costs and damages incurred by the Company should it later be determined that the Company was wrongfully enjoined.

The *Panoramic* decision does not advance the same definition of financial imperative as the Respondent. Even if this Court were to assume that the Company's projected losses were reasonably substantiated, those losses would be insufficient to constitute a financial imperative within

---

2. In footnote 5 of its Brief in Opposition, the Respondent points out that the Union objected to the introduction of such evidence concerning the merits of the grievance prompting the injunction. This objection was made by Petitioner's counsel on the ground that the Court was not the proper forum in which to adjudicate the merits of the grievance. At the time of the objection, Petitioner's counsel did not expect that the District Court would proceed as it did by ruling upon the merits of the underlying grievance without admitting *all* relevant evidence concerning the grievance.

the meaning of *Panoramic*. In describing a situation wherein a financial imperative might justify tipping the balance of hardship in favor of an employer, the Seventh Circuit stated:

> The instant case [where injunctive relief is warranted] is . . . unlike the situation in *Local 1115, Joint Board Nursing Home & Hospital Employees v. B & K Investments, Inc.*, 436 F. Supp. 1203, 1209 (S.D. Fla. 1977), in which the Court denied (but subsequently granted) an injunction against the sale of a business on the ground that the loss of the proposed purchaser would *force the seller out of business.*

See Panoramic Corp., 668 F.2d at 289. The urgent circumstances described in *Panoramic*'s description of "financial imperative" do not match the Respondent's definition. The Lima, Ohio stores represent but three (3) of the Kroger Company's one thousand ninety (1,090) stores nationwide. An injunctive delay in transferring these stores would not have had any adverse impact upon the Kroger Company's business as a whole.

Whether or not the Company's sale of its Lima, Ohio stores was motivated by a proper financial imperative is an element of the broader issue of balancing the hardships between the parties. When balanced against the hardship that the Union would suffer as a result of the Company's breach of the collective bargaining agreement and the resulting vitiation of the arbitral process, the Kroger Company's unsubstantiated losses on three (3) of its one thousand ninety (1,090) stores nationwide cannot reasonably be viewed as a financial imperative warranting immediate sale.

The overriding issue in the instant case is the continued viability of the arbitral process, and the negative

impact that the existing conflict among the Circuits will have upon preserving arbitration as a means of industrial dispute settlement. The Respondent evades this issue in its discussion of the cases posing conflict with the *Panoramic* decision. The Respondent asserts that the Third Circuit's decision in *Nursing Home & Hospital Union No. 434 v. Skyview Terrace, Inc.*, 759 F.2d 1094 (3rd Cir. 1985) is inapplicable to the present case because it involves the distribution of sale proceeds pending arbitration. Similarly, the Respondent dismisses as irrelevant the Fourth Circuit's decision in *Lever Bros. Co. v. International Chemical Workers Union, Local 217*, 554 F.2d 115 (4th Cir. 1976), on the ground that the Fourth Circuit's decision did not involve a challenge to the District Court's balancing of the hardships. These cases are relevant to the case at bar in that they focus upon the preservation of the arbitral remedy. It is the conflicting manner in which the Circuits have acted to enforce the arbitral remedy that presents the conflict giving rise to the instant Petition for a Writ of Certiorari.

In view of the Respondent's failure to recognize this critical issue, it is not surprising that the Respondent questions the relevance of the Eighth Circuit's decision in *Smegal v. Gateway Foods*, 763 F.2d 354 (8th Cir. 1985). Although the *Smegal* decision arose in the context of a suit for breach of the duty of fair representation, the *Smegal* case is highly relevant to the facts at bar in that it imposes upon unions the duty to enforce contract successors and assigns clauses on behalf of union members. The present split in the Circuits renders it impossible for a union to take effective measures to enforce contract successors and assigns language. The *Smegal* decision is significant in that it imposes upon unions a duty which the courts will not consistently permit it to perform.

B. THE ISSUES PRESENTED ARE NOT MOOT

The Respondent begins its argument in favor of mootness by stating that:

> Kroger long ago disposed of the assets of the three (3) Lima stores. Thus, the action the Union sought to enjoin has already occurred and can no longer be prevented.

See Brief in Opposition at p. 8.[3] This rhetorical argument fails to address the applicability of the exception to the mootness doctrine outlined in *Weinstein v. Bradford*, 423 U.S. 147 (1975). Briefly, *Weinstein* permits judicial review where:

(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and

(2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

---

3. The Respondent's objections on the issue of mootness would be more appropriately raised in the form of a cross petition. Although the Respondent does not elaborate upon its objections to the Sixth Circuit's ruling on mootness, its argument, if accepted by this Court, would constitute a complete defense to the Company. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381, n.4. If this Court were to rule on the instant Petition on the basis of mootness, such a finding would not only reverse a significant portion of the Sixth Circuit's decision, but would further negate the propriety of the appeal to the Sixth Circuit in its inception. The Company's willingness to accept the Sixth Circuit's holding with respect to mootness is of no consequence. *See National Labor Relations Board v. International Van Lines*, 409 U.S. 48 (1972); *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426 (1941). The issue of mootness is essential and dispositive of the case at bar, therefore, the issue of mootness should have been raised in the form of a cross petition for a writ of certiorari.

See 423 U.S. at 149. The *Weinstein* test, as applied in *Johanson v. San Diego District Council of Carpenters,* 745 F.2d 1289 (9th Cir. 1984) is controlling here. *Johanson* extended application of the *Weinstein* test to the realm of collective bargaining. *Johanson* involved the appeal of a court-ordered ten day picketing hiatus, which had expired prior to the hearing of the appeal. The pivotal issue in *Johanson* was whether or not injunctive relief was an appropriate remedy for the charged illegality. *See* 745 F.2d at 1292-93. The propriety of injunctive relief is also the central issue before this Court. The unique nature of the dispute between the Union and the Company demands injunctive relief in that the Union cannot enforce the contract's successors and assigns clause absent an injunction preventing any sale of Company assets prior to arbitration.

The Kroger Company, by virtue of its status as a prosperous, multi-unit corporate entity, is in a unique position to circumvent the successors and assigns clause by selling off selected stores at will without any risk to its economic structure. The Kroger Company and the Union are signatory to other contracts concerning Company stores. The exception to the mootness doctrine has been specifically upheld in collective bargaining situations characterized by "cyclical" bargaining or recurrent labor disputes. *See Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115 (1974). A balanced collective bargaining relationship between the parties cannot be sustained if the Company is permitted to wield the threat of closing stores without binding successors in the event that concessions are not met to the letter.

The very fact that the Kroger Company has disposed of its assets exemplifies why the instant case falls within

the "capable of repetition yet evading review" exception to the mootness doctrine. The Sixth Circuit below properly concluded that:

> [t]he issue between these parties is certainly capable of repetition since this same collective bargaining contract between the parties covers many other Kroger stores in Northwestern Ohio. If Kroger sought to dispose of another of these stores without requiring an assumption of the obligations of the collective bargaining contract by the purchaser, the same issue would be presented.

See App. p. 7. The Sixth Circuit further held that:

> the Union may not be able to obtain an arbitration ruling as to whether, if the stores had not been sold, Kroger would have been proscribed, under a proper construction of the contract, from selling the stores absent an assumption by the purchaser of the obligations of the collective bargaining contract. Thus, it appears to us that this important claim of the Union may well evade review.

See App. p. 9-10. Thus, even though the Sixth Circuit arrived at the wrong conclusion concerning the appropriateness of injunctive relief, the issue of mootness was properly dispensed with.

CONCLUSION

The arguments raised in the Kroger Company's Brief in Opposition are unpersuasive, and exemplify the need for this Court's review of the important issues presented by the case below. For the reasons stated herein and in its Petition, Petitioner United Food & Commercial Workers Union Local No. 626 respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

TED IORIO, *Counsel of Record*
GALLON, KALNIZ & IORIO CO., LPA
3161 N. Republic Blvd.
Toledo, Ohio 43615
(419) 535-1976
Counsel for Petitioner, UFCW Local No. 626